Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PETER CHARTSCHLAA and ANGELA SAWICKI KING, as personal representatives of ALEX CHARTS, deceased, doing business as Alex Charts Agency, Inc. and Charts Insurance Associates, Inc.

Petitioners

v.

NATIONWIDE MUTUAL INSURANCE COMPANY, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, NATIONWIDE LIFE INSURANCE COMPANY, NATIONWIDE PROPERTY AND CASUALTY COMPANY, NATIONWIDE VARIABLE LIFE INSURANCE COMPANY AND COLONIAL INSURANCE COMPANY OF CALIFORNIA

Respondents

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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Jan. 13, 2009

QUESTIONS PRESENTED

1. Whether causes of action based on violations of the Connecticut Franchise Act, Conn. Gen. Stat. § 42-133e et seq. and the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110a et seq., are property of the Chapter 7 debtor and not the estate under this Court's decision in *Segal v. Rochelle* 382 U.S. 375 (1966) and 11 U.S.C. § 541(a)(1), when the violations occurred post-petition.

2. Whether the Second Circuit's decision improperly concludes that an award of damages consisting solely of projected post-petition earnings based on the post-petition personal services of the Chapter 7 debtor, are property of the estate, in derogation of 11 U.S.C. § 541(a)(1) and § 541(a)(6).

3. Whether the Second Circuit's decision, concluding that a Connecticut Corporation comes into existence prior to a certificate of incorporation being filed with the Secretary of State, impermissibly preempts State law which defines when a Corporation comes into existence (Conn. Gen. Stat. § 33-637(a)) and conflicts with this Court's holding in *Butner v. United States*, 440 U.S. 48 (1979).

4. Whether the Second Circuit's decision, concluding that a Chapter 7 trustee's intent to abandon an asset must be clear and unequivocal, in the context of a case in which there was notice and a hearing, establishes a new standard with respect to abandonment in derogation of 11 U.S.C. § 554.

5. Whether the Second Circuit's conclusion that the claim is property of the bankruptcy estate compelled it to

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LIST OF PARTIES TO THE PROCEEDING

The parties in the caption are the parties to this case.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner Charts Insurance Associates, Inc. states that it has no parent companies or subsidiaries and no publicly held company owns 10% or more of its stock.

TABLE OF AUTHORITIES

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Peter Chartschlaa and Angela Sawicki King as personal representatives of Alex Charts, deceased, doing business as Alex Charts Agency, Inc. and Charts Insurance Associates, Inc., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, Pet. App. 1, reversing the decision of the District Court is reported at *Chartschlaa v. Nationwide Mutual Insurance Company*, 538 F.3d 116 (2d Cir. 2008).

The opinion of the District Court, Pet. App. 12, denying in part and granting in part respondents' motion for judgment as a matter of law or, in the alternative, motion for a new trial, granting petitioners' motion for attorney's fees, and denying petitioners' motion for prejudgment interest is reported at *Alex Charts and Charts Insurance Associates, Inc. v. Nationwide Mut. Ins. Co.*, 397 F. Supp. 2d 357 (D. Conn. 2005).

The decision of the District Court, Pet. App. 61, on remand from the Second Circuit, holding that the claims asserted by the petitioners are not property of the bankruptcy estate and the petitioners have standing to assert the claims, is reported at *Charts v. Nationwide Mut. Ins. Co.*, 300 B.R. 552 (D. Conn. 2003).

The decision of the Second Circuit, Pet. App. 74, vacating the District Court decision that adopted the recommendation of a United States Magistrate Judge that the matter be dismissed because, *inter alia*, the claims at issue were property of the bankruptcy estate of petitioner Charts and remanding with directions the estate be joined as a party is recorded at *Alex Charts and Charts Insurance*

Associates, Inc. v. Nationwide Mut. Ins. Co., 16 Fed. Appx. 44, 2001 WL 682459 (2d Cir. 2001).

The District Court's decision approving the recommended ruling of the Magistrate Judge, Pet. App. 78, is unpublished.

The recommended ruling of the Magistrate Judge, Pet. App. 82, granting the respondents' Motion for Summary Judgment, finding the claims at issue were vested in the bankruptcy estate of Mr. Charts is unpublished.

BASIS FOR JURISDICTION

The Second Circuit's decision sought to be reviewed was entered on August 14, 2008. The Second Circuit's order denying petitioners' Petition for Panel Rehearing and or Hearing En Banc was entered on October 15, 2008. The petitioners timely filed their petition for Writ of Certiorari by delivering it on January 13, 2009 to a third-party commercial carrier for delivery to the Clerk within 3 calendar days. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS OF LAW

The following statutory provisions are relevant to this matter: 11 U.S.C. §§ 541(a)(1), 541(a)(6), 554(a); Conn. Gen. Stat. §§ 33-637, 42-110 et seq., 42-133e et seq.; pertinent text is set out in the appendix at Pet. App. 90-104.

STATEMENT

The District Court had jurisdiction over this case pursuant to 28 U.S.C. § 1332, as there is complete diversity between the opposing parties.

This case is the subject of one unreported Order of the Second Circuit Court of Appeals, *Charts v. Nationwide Mut. Ins. Co., Inc.*, 16 Fed. Appx. 44, 2001 WL 682459 (2d

Cir. Jun 15, 2001) ("Charts I"), two reported decisions of the United States District Court for the District of Connecticut, *Charts v. Nationwide Mut. Ins. Co., Inc.*, 300 B.R. 552 (D. Conn. 2003) ("Charts II") and *Charts v. Nationwide Mut. Ins. Co., Inc.*, 397 F. Supp. 2d 357 (D. Conn. 2005) ("Charts III"), and one reported decision of the Second Circuit Court of Appeals, from which the Plaintiffs petition this Court for certiorari, *Chartschlaa, et al. v. Nationwide Mut. Ins. Co., Inc.*, 538 F.3d 116 (2008) ("Charts IV").[1] The claims underlying every element of this case stem from the wrongful termination by Nationwide Insurance Company of one of its most successful and prominent independent insurance agents, Charts Insurance Associates, Inc. and its president Alex Charts.

On December 20, 1978 Alex Charts entered into an Agent's Agreement with Nationwide Insurance. Mr. Charts' company, Alex Charts Agency, Inc. ("ACAI") signed Corporate Agency Agreements with Nationwide in 1987 and in 1988.

While he worked under the Nationwide logo, Mr. Charts achieved the highest awards and was consistently one of the most decorated, honored and successful producers in the entire Nationwide system.

On November 30, 1992, Alex and Helena Charts filed for protection under Chapter 7 of the U.S. Bankruptcy Code. ACAI was still party to a Corporate Agency Agreement with Nationwide. ACAI was a Connecticut stock corporation and Mr. Charts owned all of the stock of ACAI. Mr. Charts' ownership of the ACAI stock was disclosed on the Chapter 7 petitions Mr. and Mrs. Charts filed.

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[1] Alex Charts died in December 2007 and by Order of the Second Circuit Court of Appeals, the administrators of his estate were substituted as parties pursuant to Fed. R. App. Pro. 43(a)(1).

On January 20, 1993 Mr. Charts formed a new corporation, Charts Insurance Associates, Inc. ("CIAI"). Mr. Charts was the President and sole stock-holder of the corporation. On May 10, 1993 a Corporate Agency Agreement was executed between Nationwide and CIAI. Nationwide, with full knowledge of the Bankruptcy, allowed Charts to continue through CIAI selling and servicing Nationwide policies as he did formerly through ACAI. CIAI complied, in all respects, with the Nationwide policies and practices.

At no point did the trustee or any creditor ever assert any interest in the assets of either ACAI or CIAI. Nationwide was never a creditor of Charts' Chapter 7 Estate. At all times, the personal services of Mr. Charts were the critical component of the success or failure of the corporations. On February 13, 1996 the Order of Discharge issued in the bankruptcy proceeding followed on March 1, 1996 by the Final Decree discharging the bankruptcy trustee.

On April 10, 1996, more than seventeen years after Mr. Charts first became an independent Nationwide Agent, and more than three years after Mr. and Mrs. Charts filed their Chapter 7 bankruptcy, Nationwide terminated CIAI. The termination letter provides no reason for the action and at no time was any reason provided.[2] Because of the termination, Mr. Charts was not able to reconstitute his agency or return to the insurance business with the same success he enjoyed while he was a Nationwide franchisee.

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[2] On January 11, 1996, Charts received a letter from Nationwide notifying him that his agreements would terminate April 10, 1996. Mr. Charts requested that Nationwide review the termination of the Agreements. Granting Mr. Charts' request, a Nationwide Administrative Agent Review Board reviewed and on February 12, 1996, endorsed Nationwide's termination of the Agreements. The Agreements terminated on April 10, 1996.

So, on August 11, 1997 Charts Insurance Associates, Inc. ("CIAI") and Alex Charts (collectively "Charts"), brought a three-count action against Nationwide alleging violations of the Connecticut Franchise Act ("the Franchise Act"), Conn. Gen. Stat. § 42-133e *et seq.*, the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. § 42-110a *et seq.*, and the implied covenant of good faith and fair dealing, in the United States District Court for the District of Connecticut.

Before the case reached trial Nationwide filed a Motion for Summary judgment that ultimately resulted in the Second Circuit's unreported decision, Charts I. A Magistrate Judge issued a recommended ruling granting Nationwide's motion for summary judgment on the ground that Charts' claims against Nationwide were part of the bankruptcy estate of Alex and Helena Charts, and as such could not be asserted by Alex Charts and CIAI. On September 29, 2000, the District Court approved the recommended ruling on that ground, over Charts' objection, and judgment entered for Nationwide. While the Magistrate Judge also recommended dismissal on the basis of judicial estoppel, the District Court did not adopt that ground. *See Charts III* at 362, Pet. App. 13.

Charts appealed and the Second Circuit, without addressing the merits of the District Court's ruling, remanded to the District Court, concluding that the bankruptcy trustee was a necessary party in making a determination as to standing. On remand, the District Court vacated its prior ruling and the action was consolidated with the bankruptcy action. Nationwide then filed a new motion for summary judgment, essentially relying on the same arguments presented in its first motion. On September 30, 2003, after reconsidering the parties' arguments, and hearing from the trustee of Charts' bankruptcy, the District Court denied Nationwide's motion for summary judgment, finding that

the claims were not property of the bankruptcy estate and Charts and CIAI had standing to assert them in this case. *See Charts III*, 397 F. Supp. 2d at 362, Pet. App. 14.

Charts I required the District Judge to reopen a long dormant Chapter 7 bankruptcy proceeding, designate a trustee, and conduct inquiry into whether the claims asserted by the Plaintiffs, Alex Charts and CIAI were property of the Chapter 7 Estate of Mr. and Mrs. Charts. It did so despite the fact that the claims in this case arise from a contract executed by Nationwide and CIAI after the Chapter 7 bankruptcy proceeding was initiated, and involve a party that did not exist before the bankruptcy was filed. The unchallenged findings of fact by the District Court are that the claims are not connected to the pre-bankruptcy activity sufficient to constitute them property of the estate. *Charts II*, 300 B.R. at 558, Pet. App. 72.

Not a single creditor or the Trustee wants anything to do with these claims. After this case was remanded to the District Court, and the District Court reopened the Bankruptcy Estate, a trustee was appointed and each creditor of the Charts Chapter 7 estate was given notice that the estate might have an interest in this case. Not a single creditor asserted in any forum that the claims made by Charts against Nationwide in this action are property of the estate. The Trustee appointed by the District Court, Richard Belford, stated unequivocally that the claims in this action are not property of the Chapter 7 estate. He also said that if the District Court decided the claims were property of the estate, he would abandon the claims to the debtors. But the bankruptcy estate remains open and a party to the action.

On December 20, 2002, Mr. Belford appeared before the District Court and unequivocally restated and rejected Nationwide's position and admitted as a party in the case that the estate did not own the claims in the litigation. Mr. Belford told the Court:

> It's been my position all along, as your Honor knows, that – first, I've never taken any position on the merits of the complaint in the litigation case. It's my position that regardless of the merits, whether it's worth a million dollars or worth zero, in any event, it's not property of the bankruptcy estate in my opinion. And in view of that, I don't think that the –it's of any value to the bankruptcy estate, and that's the reason I filed my notice of intention – notice of proposed abandonment and opportunity for objections.

The Trustee agreed with Charts that the claims in this case were not property of the estate. The District Court denied Nationwide's Motion for Summary Judgment and the case was tried to a jury. *Charts II*.

Trial commenced in the District Court on November 29, 2004. Charts alleged that Nationwide's termination violated the Connecticut Franchise Act because a franchise may not be terminated except for good cause shown and upon written notice with the cause of termination stated therein. Nationwide stipulated that Charts was trained by Nationwide, ran an independent business under the Nationwide Trademark, pursuant to a marketing plan prescribed in substantial part by Nationwide, subject to Nationwide's control in all material respects and was engaged in the business of offering to sell, selling, servicing and distributing Nationwide insurance products in Connecticut. The uncontroverted evidence at trial was that Charts was engaged in the business of offering to sell, selling, distributing and servicing Nationwide Insurance products under a marketing plan prescribed in substantial part by Nationwide, subject to Nationwide's control, and in all events, under, and in association with, Nationwide's trade and service marks. Nationwide's admissions and the consistent evidence at trial gave the jury sufficient evidentiary support for its finding that Nationwide

granted Charts and CIAI a franchise under the Connecticut Franchise Act. *Charts III* at 367-368, Pet. App. 23-24.

Nationwide argued that even if Charts was a franchise it had good cause to terminate and told the jury during its opening statement that it "investigated the allegations that the Charts had engaged in [rebating]" and "conclud[ed] that he had violated *company policy and practice.*" But, at no time during the trial did Nationwide introduce evidence that the reasons underlying the termination of the franchise were violations of state law. *Charts III* at 369, Pet. App. 26. The jury had enough evidentiary support to find that there was not "good cause" for termination. For example, the termination letter sent by Nationwide to Charts, which was entered into evidence, fails to mention the "rebating" incidents as a ground for the termination. In addition, other Nationwide employees testified that they had engaged in similar actions when selling Nationwide policies. *Charts III* at 369-370, Pet. App. 27-28. Nationwide violated the Franchise Act when it terminated Charts and the wrongful termination damaged Charts and gave rise to the Franchise Act claim.

Charts also alleged that Nationwide violated the Connecticut Unfair Trade Practices Act ("CUTPA") and that Charts suffered an ascertainable loss when Nationwide terminated the Agents Agreements. CUTPA applied to the parties' relationship and there was sufficient evidence from which the jury could have found that the acts complained of occurred in the conduct of trade or commerce. *Charts III* at 371, Pet. App. 30.

The jury was instructed that in order for it to find that Nationwide engaged in unfair or deceptive trade practices, it may find that "[t]he practices proved by Charts, without necessarily having been previously considered unlawful, *offend public policy as it has been established by statutes,* the common law, or otherwise-in other words, it is within

at least the penumbra of some common law, *statutory,* or other established concept of unfairness."(emphasis added). *Charts III* at 371, Pet. App. 31. Thus, a finding that Nationwide violated the Franchise Act, and the public policy expressed therein, could support a finding that Nationwide also violated CUTPA. *Id.*, Pet. App. 31-32.

In its portion of the jury charge concerning CUTPA the Court specifically instructed the jury that it could not consider "any actions taken by Nationwide or its employees prior to August 11, 1994 [three years before the suit was brought] on Charts' CUTPA claim." *Charts III* at 372 n. 13, Pet. App. 32. Charts' CUTPA claim accrued, like its Franchise Act claim, upon termination of the franchise, more than three years after Alex and Helena Charts filed for Chapter 7 protection.

At the conclusion of Charts' case-in-chief, Nationwide made an oral motion for judgment as a matter of law pursuant to Rule 50. The Court denied that motion without prejudice to Nationwide renewing it at the conclusion of all the evidence. Nationwide made a second motion for judgment as a matter of law at the conclusion of all the evidence. The Court reserved judgment until after the jury reached its verdict. *Charts III*, 397 F.Supp.2d at 362, Pet. App. 14.

On December 10, 2004, the jury returned its verdict in favor of Charts on all three counts. The Court entered judgment in accordance with the jury's verdict. On December 23, 2004, Nationwide renewed its request for judgment as a matter of law or a new trial. Both parties subsequently submitted numerous memoranda of law in response to Nationwide's motion. *Charts III* at 362-363, Pet. App. 14.

Nationwide made one argument directed at all three counts, renewing the argument that it presented in its summary judgment papers. Nationwide's post-verdict Rule 50 motion argued that it was entitled to judgment as a

matter of law on all three counts on the ground that Charts lacked standing because the claims were part of the bankruptcy estate. The Court found that it need not revisit that decision because Nationwide failed to make the argument in its original pre-verdict Rule 50 motion for judgment as a matter of law. *Charts III*, 397 F. Supp. 2d at 364, Pet. App. 18. Even though Nationwide failed to argue that the Court should address its position to prevent a manifest injustice, the District Court concluded that such a result would not occur, "as the evidence at trial did not alter the Court's prior conclusion on the standing issue." *Charts III* at n. 5, Pet. App. 17. The District Court granted Nationwide's Motion for JMOL as to the implied covenant of good faith and fair dealing. *Charts III* at 373-374, Pet. App. 35-36.

Nationwide Appealed and Charts Cross-Appealed and the case returned to the Second Circuit where the Court heard oral argument on October 23, 2006 and requested the parties submit letter briefs on issues Nationwide's counsel raised during the course of the argument. The parties submitted letter briefs to the Court in which Nationwide raised new arguments, one specifically upon which the case came to rest, in a footnote.

Only then did Nationwide introduce the concept that CIAI was "simply a renamed successor to Charts Old Agency," *Charts IV* at 11; and as such should have been disclosed on the Chapter 7 petitions. The argument was never raised in a motion for summary judgment. That CIAI was a sham was suggested for the first time in footnote 1 of the Letter Brief dated October 26, 2006 filed by Nationwide. That is a critical problem. It was impossible for Charts at that point to develop the factual record to defend against the claim.

The issue raised by Nationwide in its renewed motion for JMOL which should have limited what that Court considered was whether Mr. Charts and/or CIAI had

standing to assert claims that arise from a franchise relationship that Nationwide wrongfully terminated. Nationwide argued that CIAI was not disclosed to the trustee or creditors in the petitions and, therefore, was an asset of the estate because it was "formed" before the filing of the Chapter 7 petition. *Charts II* at 556-7, Pet. App. 69. That was the same argument that resulted, in 2001, in *Charts I,* in which the Second Circuit directed the District Judge to reopen the estate, have a trustee appointed and appear and then, with all parties in the case, figure out who owned the claims asserted here. That was done. The claims belonged to Charts and CIAI – not the estate.

And, again, at no time did Nationwide argue that ACAI and CIAI were the same. The Second Circuit ignored incontrovertible bankruptcy law and Connecticut state law regarding the debtors' interests which compel the legal conclusion that CIAI did not exist pre-petition, and that both Charts as an individual and CIAI had a post-petition franchise relationship with Nationwide which the jury properly found was wrongfully terminated.

Footnote 2 at page 362 of *Charts IV,* in which the Court of Appeals said that Charts never argued that CIAI was entitled to claim the exemption listed in the Chapter 7 petitions for ACAI, Pet. App. 9, ignores the fact that there was no reason to make the argument before. Nationwide's argument was that CIAI "existed" before Charts filed for protection under Chapter 7. *Charts II* at 554, Pet. App. 65. It did not.

When Nationwide suggested that both corporations should be treated as one in the Letter Brief, p. 2, n. 1, it was too little too late.

The trustee and the creditors had notice of the claims in this case. Not one creditor came forward and the trustee said the estate has no interest in the case.

SUMMARY OF ARGUMENT

The decision below impermissibly ignores the definition of property of the estate set forth in 11 U.S.C. § 541(a)(1), in concluding that causes of action for violations of the Connecticut Franchise Act and CUTPA are part of the Chapter 7 debtor's bankruptcy estate, even though it is undisputed that the causes of action accrued post-petition and that all the events comprising the elements of the two causes of action occurred post-petition. At the time Mr. Charts filed his Chapter 7 petition the causes of action did not exist, nor were they anticipated, likely, or even potential causes of action. In finding that these causes of action were part of the bankruptcy estate the court below impermissibly expands this Court's decision in *Segal v. Rochelle*, 382 U.S. 375 (1966), as well as impermissibly extends the reach of 11 U.S.C. § 541(a)(1).

The decision below creates a precedent that results in any causes of action which accrue to a Chapter 7 debtor post-petition, when the Chapter 7 debtor continues in the same line of business being pulled back into the debtor's estate. Such a rule conflicts with the clear text of the Bankruptcy Code, the intent of the Bankruptcy Code to provide a "fresh start" to the debtor, and the holdings of other Circuits and District Courts which have correctly analyzed the definition of property. Under the reasoning of the decision below, a debtor who continues in the same line of business can never obtain the fresh start that is one of the objectives of the Bankruptcy Code.

The decision below impermissibly and incorrectly extends the analysis and language of this Court in *Segal v. Rochelle*, 382 U.S. 375 (1966), relating to post-petition property becoming property of the estate only if "sufficiently rooted in the pre-bankruptcy past," *Segal* at 380, to encompass causes of action accruing post-petition.

The correct interpretation and application of 11 U.S.C. § 541(a)(1) in the context of post-petition causes of action is

an issue of particular public importance in the present economic climate. The decision below conflicts with the decisions of this Court in *Segal v. Rochelle* and *Lines v. Frederick,* 400 U.S. 18 (1970) on the important issue of the reach of 11 U.S.C. § 541(a)(1). The decision below conflicts with decisions of the Third, Fifth, and Eleventh Circuit Courts of Appeal.

The Second Circuit's decision also conflicts with decisions of the Fifth and Ninth Circuit Courts of Appeal with respect to whether an award of damages comprised solely of projected post-petition earnings based on the personal services of the debtor are assets of the bankruptcy estate. The decision below fails to consider, analyze or even address the nature of the asset – i.e., damages consisting of projected post-petition personal services earnings – and by so failing creates a precedent that conflicts with the decisions in other Circuits and eviscerates the personal services exemption found in 11 U.S.C. § 541(a)(6), which exempts from the estate earnings from services performed by an individual debtor after the commencement of the case. An award of damages which consists solely of a projected amount of earnings based on the post-petition personal services of the Chapter 7 debtor Alex Charts falls within the exemption contained in 11 U.S.C. § 541(a)(6). This important question with respect to the scope of the exemption contained in 11 U.S.C. § 541(a)(6) needs to be clarified and the conflict between the Circuits needs to be resolved.

In order to reach the result in the decision below, the Second Circuit disregarded clearly controlling State law, and decisions of this Court with respect to the applicability of State law, when it concluded that a Connecticut Corporation was formed prior to a Certificate of Incorporation being filed with the Connecticut Secretary of State. In so concluding, the Second Circuit impermissibly preempted State law regarding corporate formation in

Connecticut. The decision below disregards decisions of this Court, *see Butner v. United States*, 440 U.S. 48 (1979), holding that interests in property are determined by reference to state law.

The effect of the decision below is to blur the statutorily mandated bright line for corporation formation in Connecticut. Both in the context of bankruptcy proceedings and for the full range of commercial and corporate transactions, this blurring of the statutory formation date for any Connecticut corporation has far reaching consequences relating to corporate formation and the controlling authority of State law in this area.

Finally, the decision below articulates a standard with respect to what constitutes abandonment of property in the context of a Chapter 7 bankruptcy proceeding that is in conflict with 11 U.S.C. § 554(a). The Second Circuit set forth a standard for abandonment stating that the "trustee's intent to abandon an asset must be clear and unequivocal." *Charts IV* at 123, Pet. App. 10. The Second Circuit did not analyze the issue of abandonment of the asset – in this case the causes of action against Nationwide – with reference to the requirements of 11 U.S.C. § 554(a), which sets forth the formal requirements for what constitutes abandonment under the Bankruptcy Code. The decision below disregards and is in conflict with the requirements of the Bankruptcy Code.

The result of the decision below is to take a valuable asset, i.e. a damage award of $2.3 million the merits of which have not been overturned, and deprive both the debtor and the creditors of the benefit of the award, a result so clearly in conflict with the purpose and intent of the Bankruptcy Code that it must not stand.

ARGUMENT

1. Charts' causes of action asserting violations of the Connecticut Franchise Act and the

Connecticut Unfair Trade Practices Act are property of Charts and not property of the bankruptcy estate

A. The decision below conflicts with the decisions of the Third, Fifth and Eleventh Circuit Courts of Appeals.

In concluding that the Connecticut Franchise Act and CUTPA claims of Charts belonged to the bankruptcy estate, the decision of the Court below conflicts with decisions of the Third, Fifth, and Eleventh Circuit courts of appeals, and numerous district courts which have analyzed the issue of whether State law claims belong to the estate. These courts have correctly held that claims accruing after the filing of the bankruptcy petition are not property of the estate.

B. Charts' claims accrued after the filing of the bankruptcy petition.

The District Court decision from which Nationwide appealed to the Second Circuit denied Nationwide's motion for judgment as a matter of law or motion for a new trial with respect to Charts' causes of action for breach of the Connecticut Franchise Act and breach of CUTPA. The asset at issue is the damage award for Nationwide's breach of these two statutes.

The Connecticut Franchise Act claim for which damages were awarded did not accrue until there was a breach of the Connecticut Franchise Act by Nationwide. In this case there was a very clear event that constituted the breach – the termination of Charts' ability to sell and service Nationwide insurance policies. It is undisputed that the termination occurred in April, 1996, more than three years after Mr. and Mrs. Charts filed for bankruptcy protection. At the time the Charts' filed the petition,

simply no cause of action for breach of the Connecticut Franchise Act existed, was anticipated, or could have been anticipated.

The same set of facts also gave rise to a cause of action based on violations of CUTPA, and again, the violation of CUTPA – the termination of Mr. Charts' ability to sell and service Nationwide insurance policies – did not occur until more than three years post-petition. A CUTPA cause of action also requires an "ascertainable loss" as an element of the claim. Conn. Gen. Stat. § 42-110g(a). Mr. Charts did not suffer the "ascertainable loss" until he could no longer sell and service Nationwide insurance policies, which did not occur until over three years post-petition. Therefore, the causes of action for which damages were awarded did not accrue until over three years post-petition and could not have been brought at the time of the commencement of the estate.

This Court has held that the determination of property rights in the assets of a bankrupt's estate is left to State law, *Butner v. United States*, 440 U.S. 48, 54 (1979). Under Connecticut law, a cause of action does not accrue until a plaintiff has suffered actionable harm. *Champagne v. Raybestos-Manhattan, Inc.*, 562 A.2d 1100, 212 Conn. 509, 521 (1989). The violation of the Connecticut Franchise Act did not occur until April, 1996, when Alex Charts' ability to sell and service Nationwide insurance policies was terminated without good cause. This event also constituted the violation of CUTPA. CUTPA further requires an ascertainable loss as an element of a claim for a CUTPA violation. Conn. Gen. Stat. § 42-110g(a). This ascertainable loss did not arise until the termination occurred. The termination did not have its genesis pre-petition.

The Circuit courts that have analyzed whether claims are property of the estate under 11 U.S.C. § 541(a)(1) have uniformly analyzed the issue from the standpoint of

determining when the claim accrued; if it accrued pre-petition it is property of the estate, if post-petition it is property of the debtor. *In re Seven Seas Petroleum, Inc.*, 522 F.3d 575 (5th Cir. 2008); *In re Witko*, 374 F.3d 1040 (11th Cir. 2004); *In re Segerstrom*, 247 F.3d 218 (5th Cir. 2001); *Bobroff v. Continental Bank*, 766 F.2d 797 (3d Cir. 1985).

In *Witko*, the Eleventh Circuit, undertaking the analysis required by 11 U.S.C. § 541(a)(1) and also followed by the 3rd and 5th Circuits in the cases cited above, analyzed whether the debtor's legal malpractice claim against his divorce attorney was property of the debtor *Witko's* bankruptcy estate. The bankruptcy court had held that *Witko's* cause of action was property of the estate because pre-petition acts formed part of a chain of events that had lead to a post-petition "redressable harm;" therefore, the cause of action was "sufficiently rooted in the debtor's pre-petition past...." *Witko* at 1044.

The Eleventh Circuit, following this Court's decision in *Butner v. United States*, 440 U.S. 48, 55 (1979), held that "property" and "interests in property" are creatures of State law. *Witko* at 1043. Then applying the appropriate State law, the Court determined that even though some of the acts constituting one element of the cause of action occurred pre-petition, the cause of action does not occur until the last element constituting the cause of action occurs. *Witko* at 1043-44, (*citing Blumberg v. USAA Cas. Ins. Co.*, 790 So.2d 1061, 1065 (Fla. 2001)). In *Witko* the last element occurred post-petition. Therefore, Mr. Witko's legal malpractice cause of action did not exist at the time he filed his bankruptcy petition and was not part of his bankruptcy estate.

Many district courts also have followed the same analysis as the *Witko* case in determining ownership of a cause of action. *See, e.g., Raines v. Strittmatter*, 2005 WL 1115804 (S.D. Ind.) (claims accruing post-petition but prior

to discharge in bankruptcy are property of debtor, not estate), *Holstein v. Knopfler*, 321 B.R. 229 (2005) (property of the estate is determined as of the commencement of the bankruptcy case; claims which do not occur until post-petition are not part of the bankruptcy estate); *Calabrese v. McHugh*, 170 F. Supp. 2d 243 (D. Conn. 2001) (To be sufficiently rooted in the debtor's pre-bankruptcy past, all of the elements of the cause of action must have occurred at the time the bankruptcy case was commenced.).

C. The Court below impermissibly expanded this Court's decision in *Segal v. Rochelle*, and its decision is in conflict with the decisions of the Third, Fifth, and Eleventh Circuits.

The Second Circuit ostensibly relied on this Court's decision in *Segal v. Rochelle* in order to find that the post-petition causes of action of Charts were "sufficiently rooted in the pre-bankruptcy past." *Charts IV* at 122, Pet. App. 9. Yet the Court undertook no analysis with respect to whether the claims occurred pre- or post-petition. The Court ignored the fact that the asset at issue in the *Segal* case – loss-carryback refunds – existed pre-petition but was realized post-petition.

In *Lines v. Frederick*, 400 U.S. 18 (1970), this Court stated that the "most important consideration limiting the breadth of the definition of 'property' lies in the basic purpose of the Bankrupty Code to give the debtor a 'new opportunity in life and a clear field for future effort'...." *Lines v. Frederick*, 400 U.S. at 19 (citations omitted). In *Lines*, as in *Segal*, this Court looked at whether the asset itself existed pre-petition, even if realized post-petition. If the asset did not exist pre-petition, it was not part of the estate.

The Second Circuit's decision muddies clear law in this Court and the Third, Fifth, and Eleventh Circuits

concerning whether causes of action occurring post-petition are property of the estate. This Court should grant the present petition to clarify this important issue.

II. The Second Circuit failed to analyze the nature of the asset, which consisted solely of monetary damages based on the projected post-petition earnings for personal services of Alex Charts when it found the asset was property of the estate in derogation of 11 U.S.C. § 541(a)(1) and § 541(a)(6).

A. The decision below creates the anomalous result of making projected earnings from post-petition personal services property of the bankruptcy estate when those services should be exempt under the plain language of 11 U.S.C. § 541(a)(6).

The plain language of the Bankruptcy Code provides that "earnings from services performed by an individual debtor after the commencement of the case" are exempt from the definition of "property" of the estate. 11 U.S.C. § 541(a)(6). This personal services exemption requires that the Court analyze the nature of the asset at issue to determine if it falls within the exemption. This the court below utterly failed to do.

If the Second Circuit analyzed or even discussed the nature of the asset, it would have reached the conclusion that the asset fell under the personal services exemption contained in the Code. It is undisputed that the asset at issue consists of $2.3 million of earnings, based on projected post-petition earnings of Mr. Charts. It also is undisputed that these projected earnings were all post-petition, as they were based on the period commencing after April, 1996. By not analyzing the asset, the Second

Circuit completely disregarded the plain language of 11 U.S.C. § 541(a)(6) and impermissibly dragged the post-petition earnings of Mr. Charts into the estate.

B. The decision below conflicts with decisions of the Fifth and Ninth Circuit Courts of Appeals which have considered the same issue.

The Fifth Circuit has on a number of occasions considered the issue of whether earnings for personal services, as well as contracts for personal services are property of the estate or are exempt. In *Ford, Bacon & Davis, Inc. v. Holahan*, 311 F.2d 901 (5th Cir. 1962), *cert. den.* 373 U.S. 913 (1963), a case decided under the Bankruptcy Act, the court examined the issue of whether post-petition payments under a personal services contract belonged to the estate. The personal services contract at issue was a contract entered into by a corporate debtor.

The Fifth Circuit held that a corporation could enter into a personal services contract. The inquiry was into the nature of the contract itself, and the exercise of some personal skill and judgment on the part of the debtor. *Ford* at 904. In the *Ford* case the court found there was a personal services contract entered into by a corporation pursuant to which personal services were provided and payment made post-petition. Therefore, the payment for services was not part of the bankrupt estate.

The Fifth Circuit has used the same analysis with respect to the personal services exemption under the Bankruptcy Code. In the case of *Matter of Clark*, 891 F.2d 111 (5th Cir. 1989), the court held that earnings for personal services received post-petition by the debtor Bruce Clark, a professional football player, under a contract entered into pre-petition, were exempt from the estate, pursuant to 11 U.S.C. § 541(a)(6). The court

summarizes its analysis as "[t]he controlling question is when the earning took place...." *Clark* at 113.

The Second Circuit's decision at issue here directly conflicts with the decisions of the Fifth Circuit. The Second Circuit in *Charts IV* in fact held that post-petition earnings for Mr. Charts' personal services (which came in the form of an award of damages) were part of the estate because they were sufficiently rooted in the pre-bankruptcy past by virtue of a post-petition contract between Charts Insurance Agency, Inc. and Nationwide, which stated it had a retroactive effective date of January 1, 1980, the approximate date Mr. Charts began selling and servicing Nationwide policies. *Charts IV* at 123, Pet. App. 9. This analysis directly conflicts with the *Ford* and *Clark* cases.

The Ninth Circuit analyzed 11 U.S.C. § 541(a)(6) in the context of whether post-petition renewal commissions paid to the debtor insurance agent for policies sold pre-petition are included within the scope of the post-petition earnings exception. The court in *In re Wu*, 173 B.R. 411 (9th Cir. 1994), analyzed whether any post-petition services were involved in order to obtain the commissions. If so, and to the extent of the post-petition services, the commissions were not property of the estate. *Id.* at 414-415. The fact that the debtor continued in the same line of business pre- and post-petition, or that the debtor continued as a State Mutual Life Assurance Company of America career agent post-petition under her pre-petition career agent agreement was irrelevant to the Ninth Circuit's analysis of 11 U.S.C. § 541(a)(6), in complete contrast with the Second Circuit's analysis in *Charts IV*.

As the decision below conflicts with 11 U.S.C. § 541(a)(6) and with decisions of the Fifth and Ninth Circuits and district court decisions as to the scope and application of 11 U.S.C. § 541(a)(6) in the context of earnings related to post-petition personal services when

the debtor continues in the same line of business or under the same contractual arrangement post-petition, this Court must clarify the correct interpretation and application of 11 U.S.C. § 541(a)(6).

III. The decision below impermissibly preempted state law which defines when a corporation comes into existence and conflicts with this Court's holding in *Butner v. United States*, 440 U.S. 48 (1979).

Corporate formation issues are governed by state law. *See, Butner v. United States,* 400 U.S. 48 (1979). Conn. Gen. Stat. § 33-637(a) unequivocally provides that a corporation's existence begins when the certificate of incorporation is filed with the Secretary of State. *Mastroianni v. Fairfield County Paving, LLC*, 942 A.2d 418, 424 (Conn. App. 2008). One of the primary goals of the Connecticut Business Corporation Act, codified at §§ 33-600 to 33-998 was to bring to the statutes the uniformity and predictability that comes from an act based on the Revised Model Business Corporations Act and which has been adopted by the majority of states. *See*, Marilyn J. Ward Ford, *Connecticut Corporation Law and Practice*, 1-1 to 1-2 (2d. ed. Supp. 2008).

The decision below ignores both the Connecticut statutes as well as incontrovertible bankruptcy law which requires reliance on state law. *See Butner v. United States*, 440 U.S. 48 (1979). The Second Circuit disregarded that the CIAI certificate of organization was filed with the Connecticut Secretary of State in January, 1993, a date post-petition. The Second Circuit did so in order to hold that CIAI existed pre-petition and should have been listed on Mr. Charts' bankruptcy schedules. *Charts IV* at 123, Pet. App. 10. The refusal of the Second Circuit to apply said statutes is a significant departure from settled law and has a profound effect on bankruptcy law. By

muddying the bright line as to when a corporation is formed the decision below puts debtors in the untenable position of not knowing what to list on their schedules and having to proceed at their peril.

IV. In analyzing the issue of abandonment, the court below failed to follow the plain language of 11 U.S.C. § 554(a).

Prior to 1978, the Bankruptcy Code did not contain any provision specifying the method of abandonment of assets by the trustee in a bankruptcy estate. The historical source of the doctrine dates to the early English Bankruptcy Acts, but the American courts consistently recognized it and applied it despite the lack of express authorization in the Bankruptcy Act. *See Note: Abandonment of Assets by a Trustee in Bankruptcy*, 53 Colum.L.Rev. 415, 416 (1953)

With the enactment of § 554 of the Bankruptcy Code in 1978 there were formal requirements for abandonment. In *Charts IV*, however, the Second Circuit, while holding that the claims at issue were not abandoned, does not make mention of the requirements of § 554(a), let alone conduct any analysis with respect to the requirements of the Code. The court preempts the Code requirements of notice and hearing, *see* 11 U.S.C. § 554(a), and substitutes its own standard of "clear and unequivocal intent" to abandon. *Charts IV* at 123, Pet. App. 10. If the court had analyzed the statutory requirements, the court would have had to find that there was in fact notice. *See* Notice of Proposed Abandonment of Property and Opportunity for Objection Thereto, Sept. 18, 2002, Pet. App. 105. The court also references testimony of the trustee in a hearing before the district court acting as bankruptcy court, but again fails to analyze or consider whether the notice and hearing requirements of the statute were met. *Charts IV* at 123, Pet. App. 11.

This Court has explained repeatedly that, in construing and applying the Bankruptcy code, the court must look to the statutory text. *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004). The court must apply the provisions of the Code as written, and refrain from engrafting provisions that do not appear on its face. *Id.* at 537. In failing to analyze abandonment in accordance with the requirements of the Code, the Second Circuit erred. Further, the court substituted its own standard for analyzing abandonment, in derogation of the Code requirements.

V. The decision below contravenes the primary purpose of the Bankruptcy Code. In finding that the asset belonged to the estate, which remains a party to the action, the court should have remanded the case.

The Court of Appeals should have remanded and directed the District Court to amend the judgment consistent with its decision. In its decision the Court of Appeals found both that the claims asserted are property of the bankruptcy estate and that the trustee did not abandon the claims. *See Charts IV* at 123-124, Pet. App. 9-11. The jury determined that the value of the claims, the right to payment, is $2.3 million. Under the Court of Appeals' analysis the judgment is property of the bankruptcy estate. On July 17, 2002 the re-opened bankruptcy case was closed and the file transferred to the District Court, withdrawing the reference of the bankruptcy case. Subsequently, in the District Court proceedings the bankruptcy estate was joined as a plaintiff. The bankruptcy estate remains a party to the action. *See Charts II* at 558, n. 7, Pet. App. 72. "The main thrust of s 70a(5) [now 11 U.S.C. § 541] is to secure for creditors everything of value the bankrupt may possess in alienable or leviable form when he files his petition."

Segal v. Rochelle, 382 U.S. 375, 379 (1966). Consistent with the purpose of the Bankruptcy Code, distribution to creditors, and its own findings, the Court of Appeals should have remanded the case with direction that the District Court Amend the Judgment in favor of the bankruptcy estate and not CIAI. No bankruptcy distributional purpose is served by simply reversing, rather if the Circuit Court's determinations must stand, the judgment should be amended in favor of the bankruptcy estate.

CONCLUSION

For all the foregoing reasons, this Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully Submitted,

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